S. HRG. 100-1018

U.S. CLAIMS COURT IMPROVEMENT ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 1608

A BILL TO AMEND TITLE 28 OF THE UNITED STATES CODE AS IT PERTAINS TO THE STRUCTURE OF THE UNITED STATES CLAIMS COURT

MARCH 4, 1988

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U.S. CLAIMS COURT IMPROVEMENT ACT OF 1987

FRIDAY, MARCH 4, 1988

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:04 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senator Grassley.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Let's come to order. Today the Subcommittee on Courts and Administrative Practice will hear testimony on S. 1608, the bill which Senator Thurmond introduced on behalf of the U.S. Claims Court.

I would like to welcome our distinguished witnesses to today's hearings and I thank you for taking the time to testify in support of this legislation.

The U.S. Claims Court was created by the Federal Courts Improvement Act of 1982, and while this has nationwide jurisdiction, its subject matter is somewhat limited to Federal tax refund cases, Government contract cases, patent and copyright infringement suits, military and civilian pay cases, fifth amendment taking claims, oil spill claims under the Federal Water Pollution Act and congressional reference cases.

However, Congress, in the vaccine compensation amendments of 1987, invested jurisdiction in the Claims Court to hear claims for vaccine-related injuries.

Currently there are 16 judges on the court—two senior judges. The judges are appointed by the President and confirmed by the Senate for a 15-year term.

Our purpose today is to learn about the history of the Claims Court, its function, its workload and the problems facing the court.

I have read the testimony and much of the testimony centers on three main issues: Tenure, salary, and administrative control.

I would note that the bill, itself, is very comprehensive and hope that this hearing will allow us to determine the scope of the legislation.

[The text of S. 1608 follows:]

II

100TH CONGRESS
1ST SESSION

S. 1608

To amend title 28 of the United States Code as it pertains to the structure of the United States Claims Court.

IN THE SENATE OF THE UNITED STATES

AUGUST 6 (legislative day, AUGUST 5), 1987

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 28 of the United States Code as it pertains to the structure of the United States Claims Court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "United States Claims Court Improvement Act of 1987".

SEC. 2. Section 172 of title 28, United States Code, is amended to read as follows:

"§ 172. Tenure and salaries of judges

"(a) Each judge of the United States Claims Court shall be appointed for a term of 15 years. Any such judge so appointed may be reappointed for a term of 15 years and if

reappointed shall continue in office until reappointed or until a successor has been appointed and taken office. If a judge is not reappointed, such judge shall continue in office until a successor has been appointed and taken office.

"(b) Each such judge shall receive a salary at the rate of pay received by judges of the United States Tax Court.".

SEC. 3. Section 173 of title 28, United States Code, is amended by inserting "at the National Courts Building" after "Columbia".

SEC. 4. Section 176 of title 28, United States Code, is amended to read as follows:

"**§ 176. Removal from office**

"The provisions regarding the manner of and causes for removal of judges of the United States Tax Court shall apply to judges of the United States Claims Court.".

SEC. 5. Section 376 of title 28, United States Code, is amended—

(1) in subparagraph (a)(1)(B) by—

(A) striking "or"; and

(B) inserting before the semicolon at the end thereof the following: ", or a judge of the United States Claims Court who files an election under section 797 of this title";

(2) in subsection (a)(1) by—

(A) striking out "; or" in the last clause and inserting in lieu thereof ", or"; and

(B) adding before the semicolon at the end thereof the following: ", or in the case of a judge of the United States Claims Court, who so notifies the Director on or before the date of an election to retire under section 797 of this title"; and

(3) in subsection (a)(2)(B) by—

(A) striking out "title or" and inserting in lieu thereof "title,"; and

(B) inserting before the semicolon at the end thereof the following: "or in the case of a judge of the United States Claims Court, an annuity paid under section 797 of this title".

SEC. 6. Section 460 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out "to the United States Claims Court,"

(2) by redesignating subsection "(b)" as subsection "(c)"; and

(3) by adding a new subsection (b) to read as follows:

"(b) Sections 452 through 455, and sections 458, 459, and 463 shall also apply to the United States Claims Court.".

SEC. 7. Section 520(a) of title 28, United States Code, is amended by inserting "or complaint" after "petition".

SEC. 8. Section 610 of title 28, United States Code, is amended by striking out "the United States Claims Court".

SEC. 9. Section 791 of title 28, United States Code, is amended—

(1) in subsection (a) by striking out "Director of the Administrative Office of the United States Courts" and inserting in lieu thereof "court"; and

(2) in subsection (b) by striking out the second sentence.

SEC. 10. (a) Chapter 51 of title 28, United States Code, is amended by inserting between section 791 and section 794 the following new sections:

"§ 792. Retirement; employee benefits

"The clerk, court executive, and all employees of the United States Claims Court shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 and chapter 84 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health insurance) of title 5. The grade and salary of such employees, where appropriate, shall be that generally applicable to like employees in the judicial branch.

"§ 793. Court executive

"The chief judge of the United States Claims Court, with the approval of the court, may appoint a court executive who shall be subject to removal by the court.".

(b) The table of sections for chapter 51 of title 28, United States Code, is amended by inserting between the item relating to section 791 and the item relating to section 794 the following new items:

"792. Retirement; employee benefits.
"793. Court executive.".

SEC. 11. Section 794 of title 28, United States Code, is amended to read as follows:

"§ 794. Law clerks and secretaries

"The judges of the United States Claims Court may appoint necessary law clerks and secretaries in such numbers as needed, subject to the availability of appropriated funds.".

SEC. 12. Section 795 of title 28, United States Code, is amended to read as follows:

"§ 795. Other employees

"The chief judge, with the approval of the court, may appoint such other employees as may be necessary to execute efficiently the functions vested in the court. Each such employee shall be subject to removal by the chief judge, with the approval of the court.".

SEC. 13. Section 796 of title 28, United States Code, is amended to read as follows:

"§ 796. Authority to contract and make expenditures

"(a) The United States Claims Court is authorized to contract for the reporting of all proceedings had in open court, and in such contract to fix the terms and conditions under which such reporting services shall be performed, including the terms and conditions under which transcripts shall be supplied by the contractor to the court and to other persons, departments and agencies.

"(b) The court shall have the authority to obtain by contract, purchase or otherwise, such support services, supplies, equipment, and furnishings from any private organization or governmental agency, as it finds appropriate to carry out its functions.

"(c) Personnel of the court shall be deemed to be personnel of the judicial branch for the purposes of section 620(b)(3) of this title.

"(d) The court shall have the authority to accept and utilize voluntary and uncompensated services, including services authorized by section 3102(b) of title 5, and to accept, hold, administer, and utilize gifts and bequests of personal property for the purpose of aiding or facilitating the work of the court, but gifts or bequests of money shall be remitted to the Treasury of the United States.

"(e) The court is authorized to make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books

of reference, and periodicals), as may be necessary to execute efficiently the functions vested in the court. Except as otherwise provided, all expenditures of the court shall be allowed and paid, out of any moneys appropriated for purposes of the court, upon presentation of itemized vouchers therefor signed by the certifying officer designated by the chief judge.".

SEC. 14. Section 797 of title 28, United States Code, is amended to read as follows:

"§ 797. Retirement and recall of judges

"(a) The provisions regarding the eligibility of judges of the United States Tax Court, as judges of such Tax Court, for retirement, retired pay and recall shall apply to judges of the Claims Court, as judges of such court in the same manner and under the same provisions as they apply to judges of the United States Tax Court. To carry out the purposes of this section, when the provisions which govern the retirement, retired pay, and recall of judges of the Tax Court are applied to judges of the Claims Court—

"(1) the term 'Tax Court' shall be deemed to mean the Claims Court;

"(2) the term 'judge' shall be deemed to mean a judge or chief judge of the Claims Court;

"(3) the term 'chief judge' shall be deemed to mean the chief judge of the Claims Court;

"(4) in any determination of length of service as a judge there shall be included all periods (whether or not consecutive) during which an individual served as judge of the United States Claims Court, or as a commissioner (trial judge) of the United States Court of Claims; and

"(5) the non-government services performed such as to cause a permanent forfeiture of retired pay shall consist of legal services in a claim against the United States within the jurisdiction of the United States Claims Court.

"(b) In addition to retirement and recall as provided in subsection (a), any judge or former judge of the United States Claims Court not in active service who is receiving an annuity, or who will upon reaching the required age be entitled to receive an annuity, under subchapter III of chapter 83, or chapter 84, of title 5, shall be eligible for recall to perform judicial duties. When so recalled such judge shall be known and designated as a senior judge.

"(c) The chief judge of the Claims Court, whenever he deems it advisable, may recall any person eligible to serve as a senior judge, with the consent of such person, to perform such duties as a senior judge and for such period of time as the chief judge may specify.

"(d) Any senior judge performing duties pursuant to this section, shall not be counted as a judge for purposes of the number of judgeships authorized by section 171 of this title.

"(e) Any senior judge, while performing duties pursuant to this section, shall receive the same pay, allowances for travel and other expenses as a judge in active service. Such senior judge if receiving an annuity pursuant to subchapter III of chapter 83, or chapter 84, of title 5 shall receive supplemental pay in an amount sufficient, when added to the amount of such annuity, to equal the salary of a judge in active service for the same period or periods of time. Such pay or supplemental pay shall be paid in the same manner as the salary of a judge in active service.".

SEC. 15. Section 798(a) of title 28, United States Code, is amended to read as follows:

"(a) The United States Claims Court is hereby authorized to utilize facilities and hold court in Washington, District of Columbia, and throughout the United States as is necessary for compliance with sections 173 and 2503(c) of this title. The facilities of the Federal courts, as well as other appropriate facilities which are administered by the General Services Administration, shall be made available for trials outside of the District of Columbia.".

SEC. 16. Title 28, United States Code, is amended by adding at the end thereof a new section 799 to read as follows:

"§ 799. Expenses for travel and subsistence

"(a) Judges of the United States Claims Court shall receive necessary travel expenses and actual expenses for subsistence while traveling on duty away from their designated station, subject to the same limitations in amount as apply to the judges of the United States Tax Courts.

"(b) The employees of the court shall receive necessary travel expenses and actual expenses for subsistence while traveling on duty away from their designated station in an amount equivalent to that provided for comparable employees in the judicial branch.".

SEC. 17. (a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of chapter 51 of title 28, United States Code, as amended by this Act. Estimates thereof shall be approved by the United States Claims Court before presentation to the Office of Management and Budget;

(b) Until such time as there is a separate appropriation for the United States Claims Court, funds appropriated and designated for the "Courts of Appeals, District Courts, and other Judicial Services" shall be made available, in the required amount, for the operation of the United States Claims

Court. Such amounts shall be determined by the Director of the Administrative Office of United States Courts and the chief judge of the Claims Court.

SEC. 18. The table of sections for chapter 51 of title 28 is amended by striking out the items relating to sections 795 through 798 and inserting in lieu thereof the following:

"795. Other employees.
"796. Authority to contract and make expenditures.
"797. Retirement and recall of judges.
"798. Places of holding court; appointment of special masters.
"799. Expenses for travel and subsistence.".

SEC. 19. (a) Section 963 of title 28, United States Code, is amended by inserting ", United States Claims Court, except for purposes of section 961," after "States".

(b) Section 961 of title 28, United States Code, is amended by inserting ", except any clerk of the United States Claims Court," after "court".

SEC. 20. Chapter 123 of title 28, United States Code, is amended—

(1) by repealing section 1926; and

(2) in the table of sections by striking out the item relating to section 1926.

SEC. 21. Section 2503 of title 28, United States Code, is amended by adding at the end thereof the following:

"(d) The Claims Court shall be deemed to be a court of the United States for the purposes of sections 1252, 1821, 1915, 1920 and 1927 of this title.

"(e) The records of the Claims Court shall be kept at its principal office, the National Courts Building, Washington, District of Columbia. Records which have become obsolete and are no longer necessary or useful may be disposed of, with the approval of the court, in the manner provided in chapter 33 of title 44.".

SEC. 22. Section 2520 of title 28, United States Code, is amended by—

(1) striking out "$60" and inserting in lieu thereof "$120"; and

(2) striking out "petition" and inserting in lieu thereof "complaint, and shall prescribe from time to time such other fees to be charged and collected".

SEC. 23. (a) Section 2521 of title 28, United States Code, is amended by—

(1) amending the title to read as follows:

"**§ 2521. Subpoenas and incidental powers**";

(2) inserting "(a)" before "Subpoenas requiring"; and

(3) adding at the end thereof the following:

"(b) The United States Claims Court shall have the same incidental powers as are provided to the Tax Court.".

(b) The table of sections for chapter 165 of title 28, United States Code is amended by amending the item relating to section 2521 to read as follows:

"2521. Subpoenas and incidental powers.".

SEC. 24. Section 308(9) of title 28, appendix II, United States Code, is amended by striking out "Court of Claims" and inserting in lieu thereof "Claims Court".

SEC. 25. (a) Any provisions relating to the United States Claims Court not amended by this Act shall remain in effect.

(b) Nothing in this Act shall be construed to change or affect the jurisdiction of the United States Claims Court.

SEC. 26. This Act and the amendments made by this Act shall take effect 60 days after the date of enactment.

○

Senator HEFLIN. I would like to ask the witnesses to limit their testimony to no more than 6 minutes, to allow time for questioning. I look forward to the testimony of the witnesses.

Senator Grassley, do you have an opening statement?

Senator GRASSLEY. No, I don't have any opening statements for the record and I anticipate staying around long enough to ask some questions. But I do have appropriations as well as budget going on this morning. So, I will have to go to that.

So, I would like to be able to ask questions in writing, if I don't get them all asked this morning.

Senator HEFLIN. We have an opening statement by Senator Thurmond, who is unable to be here, which should be entered into the record.

[The prepared statement of Senator Strom Thurmond follows:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, I would like to commend you for holding this hearing to consider S.1608, the "United States Claims Court Improvement Act of 1987". I introduced this bill as a means to review the current structure of the United States Claims Court.

Briefly, I would like to discuss certain provisions in this bill. The Claims Court is presently under the authority of the Administrative Office of the United States Courts. This legislation would re-establish the Claims Court in the executive branch of the Federal Government giving it greater autonomy than it currently enjoys. The effect of the legislation would be to make the Claims Court similar to the Tax Court in operational and administrative aspects as well as to upgrade the benefits of the Claims Court judges.

Under the existing framework, the Administrative Office of the United States Courts oversees the administrative and budgetary concerns of the United States Claims Court. S.1608 would remove the United States Claims Court from the umbrella of the Administrative Office and, as a consequence, the Claims Court would be responsible for submitting its own budget request to the Office of Management and Budget. This, it is suggested, would lead to a budget more appropriately designed for the specific needs of the Claims Court. Whether or not this particular provision is approved, it is certainly worthy of our consideration.

This bill also seeks to upgrade the retirement system of Claims Court judges. S.1608 would provide Claims Court judges with the same retirement system in place for Tax Court judges. Since Tax Court judges and Claims Court judges both serve 15-year terms a similar system for these two courts should be considered. Adoption of such legislation will ensure the appointment and retention of highly qualified Claims Court judges. This, in turn, will greatly benefit all citizens who appear before the court.

Some of the changes proposed by S.1608 are similar to other items of legislation which have been introduced in the 100th Congress. I believe a review of the entire court system would be the most appropriate procedure to comprehensively examine the concerns raised by judges in regards to judicial administration, salaries, and benefits. We could then resolve those concerns in a rational and consistent manner. This possibility should be considered in the future.

I am most interested in issues which impact upon the qualify of our judiciary. I look forward to hearing from our distinguished panelists who will testify today.

Senator HEFLIN. Also, a letter in support of legislation from the Federal Bar Association will be entered into the record as well as the attachment, which is a report on it.

[Letter with attachment follow:]

Federal Bar Association

Office of the President
James T. Bland, Jr.
Respond to:
Armstrong, Allen, Prewitt,
Gentry, Johnston & Holmes
1900 One Commerce Square
Memphis, TN 38103
901/523-8211

January 22, 1988

Honorable Howell T. Heflin, Chairman
Courts and Administrative Practice Subcommittee
Committee on the Judiciary
Suite 728
Hart Senate Office Building
Washington, D.C. 20510

OFFICE OF SENATOR HEFLIN
1988 JAN 26 AM 10 57

Dear Senator Heflin:

At our recent National Council Meeting in Washington, D.C., held on December 12, 1987, the Federal Bar Association unanimously adopted resolution No. 88-1, a copy of which is enclosed, which supports legislation to restructure the United States Claims Court. The legislation would provide pay, recall and tenure provisions equivalent to those of the United States Tax Court, and it would also provide an independent administrative support structure similar to that of the United States Tax Court.

On behalf of the Federal Bar Association, I urge the Senate Judiciary Committee and the United States Senate to act favorably and expeditiously on proposed legislation, such as S. 1608. The United States Claims Court was created as an Article I court with nation-wide jurisdiction similar in scope and authority to the United States Tax Court, but without an equivalent independent administrative support structure, or equivalent pay, recall and tenure provisions. It is now clear that the Claims Court should be granted the equivalent structure and benefits in order that speedy and effective justice for those with valid claims against their sovereign may be achieved. It is also necessary in order to retain currently sitting Judges at the Court as well as to recruit well qualified lawyers as these positions become vacant. We urge the Congress to act on this matter of vital concern to the Federal Judiciary and the Bar prior to the conclusion of the 100th Congress.

I will be pleased to appear at hearings on legislation to this effect and testify on behalf of the Federal Bar Association in support of such legislation. I would appreciate your placing this letter and accompanying resolution in the record of any hearings on this legislation.

Thanking you for your cooperation and courtesy, I am

Very truly yours,

James T. Bland, Jr.

James T. Bland, Jr.
President

JTB/lf
Enclosure

RESOLUTION 88 - 1

SUPPORT FOR S. 1608, A BILL TO AMEND TITLE 28 OF THE ~~UNITED~~ STATES CODE AS IT PERTAINS TO THE STRUCTURE OF THE UNITED STATES CLAIMS COURT

Whereas, the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, created two new federal courts, the United States Court of Appeals for the Federal Circuit (CAFC) and the United States Claims Court, but the main focus of the legislation was the creation and the structure of the CAFC, thereby leaving various structural concerns involving the Claims Court for another day;

Whereas, the Claims Court was created as an Article I court with nation-wide jurisdiction similar in scope and authority to the United States Tax Court but without an equivalent independent administrative support structure, or equivalent pay, recall and tenure provisions;

Whereas, the Claims Court has now been functioning for over five years and that experience has shown the necessity to revisit and enhance the structure of the court so that speedy and effective justice for those with valid claims against their sovereign may be achieved;

Now, therefore be it resolved, that the Federal Bar Association support legislation, such as S. 1608, 100th Congress, to amend Title 28 of the United States Code as it pertains to the structure of the United States Claims Court, by providing pay, recall and tenure provisions equivalent to those of the United States Tax Court, by providing an independent administrative support structure similar to that of the United States Tax Court and by providing for various housekeeping revisions which are essential for the proper functioning of the court.

Be it further resolved, that the President of the Federal Bar Association communicate its support for such legislation to the Senate Judiciary Committee, and to the House Judiciary Committee and to the other members of the Congress, and to the Administration, by such means as may be appropriate.

Presented to the National Council of the Federal Bar Association, Washington, D.C., December 12, 1987.

REPORT ON S. 1608, A BILL TO AMEND TITLE 28
OF THE UNITED STATES CODE AS IT PERTAINS
TO THE STRUCTURE OF
THE UNITED STATES CLAIMS COURT

The Claims Court is uniquely "The Citizen's Court." Its original jurisdiction was created in 1855 to deal with a growing problem confronting the Congress. Numerous citizens were seeking justice from the United States Congress through the introduction of private bills for relief. This was happening because the judicial doctrine of sovereign immunity precluded citizens from suing their Government in federal courts on their legitimate claims against the Government. Hence, the United States Congress in 1855 created the United States Court of Claims to hear and adjudicate those legitimate claims. The creation of the Court of Claims in 1855 responded to a very basic democratic imperative: fair dealing by the Government in disputes between the Government and its citizens.

This system, established 132 years ago, is now threatened. It is threatened by the appearance of a lack of independence, and the reality of an inefficient administrative system which does not respond to the needs of a growing and dynamic judicial system.

In 1982, the Federal Courts Improvement Act, Pub. L. No. 97-164, was enacted. This legislation created two new federal courts, the United States Court of Appeals for the Federal Circuit (CAFC) and the United States Claims Court. The Claims Court was the successor in interest to all the jurisdiction and trial functions of the former Court of Claims. In creating the two courts, however, the Congress focused the majority of its attention on the creation and structure of the CAFC and not on the Claims Court. It left several structural matters pertaining to the Claims Court to be accomplished at a later time. Specifically, it deferred questions of salary and tenure, as well as administrative operations to a later date. Now with five years experience, those deferred matters are causing problems which S. 1608 seeks to address.

The problems can be solved by three relatively straightforward amendments of the current statutes governing the United States Claims Court. The first amendment would create an independent administrative support structure for the Court. Such a structure would place the Court under the direct budgetary and administrative oversight of the Congress, and is patterned after the current structure of the United States Tax Court.

Currently, the Claims Court goes through the Administrative Office of the United States Courts, and then through the Judicial Conference of the United States for all of its administrative and budget support. These entities are designed to deal with the various Article III courts and special judicial officers attendant to those courts. The needs of the Claims Court cannot be efficiently addressed in this system. Nor can proper attention be given to the concerns of the nearly 12,000 claimants and the special types of cases pending before the Claims Court.

The second amendment deals with the problem of recall, tenure and retirement. Currently, all judges have 15-year terms, with no possibility of recall or pension until they are eligible for retirement. At present, the only retirement system applicable to the judges of the Claims Court is the regular civil service retirement. The civil service retirement system is grossly inadequate in that it contemplates a meaningful retirement only for persons that have served a full federal career (usually a minimum of 30 years for voluntary retirement), and is simply not designed for judges that have been appointed to limited terms of judicial office. Many of the judges appointed to the Claims Court would not be eligible for retirement (by age or service) when they complete their 15 year term, thus raising serious considerations of basic independence and equality with other judicial retirement systems.

The present system creates the perception of lack of an independent judiciary by virtue of the process of reappointment. There is no evidence that the Court's judges have failed to observe strict neutrality between the private claimants and the Department of Justice representing the defendants. However, it is the Department of Justice that makes judicial recommendations to the President for reappointments of the judges of the Claims Court and it is also the same Department of Justice which is the defendant in every case before the Court. In any event, without an adequate recall, tenure and retirement plan, the Claims Court will likely suffer serious attrition in quality, experience and manpower as the judges' terms draw to a close.

S. 1608 seeks to remedy this recall, tenure and retirement problem by adopting the Tax Court system of life salary and mandatory recall. If a judge of this court is not reappointed by the President after a full fifteen year term is served, he is placed in senior active status and must serve for at least 90 days each year until age 65 when he may voluntarily retire at full salary.

The third amendment is perhaps the simplest, and was recommended by the Commission on Executive, Legislative and Judicial Salaries (Pay Commission) and unanimously adopted by the Senate on the last day of the 99th Congress, i.e., fixed salary parity with all the other Article I and Article III courts. Currently, the Claims Court is the only United States court that does not have fixed salary parity with the other Article I and III courts. Since the Claims Court handles some of the largest and most complex tax, contract, patent, condemnation, Indian and other cases litigated in the federal system, this is ironic. Equal pay for equal work is a principle of sound administration as well as a noble ideal.

Congress created a separate and unique entity to deal with claims against the sovereign. From a review of the legislative history, many of the disparities, which currently are of concern to the Claims Court and its litigants were unanticipated or left to be revisited at a later time when the Federal Courts Improvement Act of 1982 was enacted. After five years under the existing legislation, the time to revisit those areas and resolve the structural problems is now.

The purpose of the S. 1608 is to remedy the structural problems by patterning the court after that which presently exists for the U.S. Tax Court, likewise an Article I court with nation-wide jurisdiction, but which is completely independent. The bill will do so by retaining the Claims Court as an Article I court within the the judicial branch but will provide for its own management and operations.

Because of the Federal Bar Association's commitment to the improvement of federal law and the quality of the administration of justice in the federal system, the National Council should adopt this resolution in support of such legislation as S. 1608 and communicate its support to the Congress and to the Administration by the appropriate means as promptly as circumstances will permit.

Respectfully submitted,

Hon. Marvin H. Morse, Chairman
The Judiciary Section

Senator HEFLIN. I notice they have a vote on. We will take a short recess now to go and vote.

[A brief recess was taken.]

Senator HEFLIN. The subcommittee will come to order.

We have as our first witness, Judge Loren Smith, chief judge, United States Claims Court. Judge Smith, we would be delighted to hear from you now. Would you like to introduce your people at the table with you, sir?

STATEMENTS OF A PANEL CONSISTING OF HON. LOREN A. SMITH, CHIEF JUDGE, U.S. CLAIMS COURT; FRANK PEARTREE, CLERK, U.S. CLAIMS COURT; AND GARY GOLKIEWICZ, CHIEF OF STAFF, U.S. CLAIMS COURT

STATEMENT OF HON. LOREN A. SMITH

Judge SMITH. Senator, I very much appreciate the opportunity, Mr. Chairman, and members of the committee, to appear before this committee.

On my left is Frank Peartree, who is the clerk of the U.S. Claims Court. He has been in that position for 26 years now and has been with the court and its predecessor, the Court of Claims, for 33 years.

On my right is Gary Golkiewicz, who is chief of staff of the court and has been with the court for a little less time.

It also is a pleasure, Senator, to appear before this committee again in my current role—in my past life as Chairman of the Administrative Conference, I had a number of opportunities to work with the committee, to appear before it as a witness and to work with the committee and its staff. And I always found that a gratifying experience.

And I also must thank the staff greatly for the—this opportunity. The staff has been great to work with under Karen Kremer's leadership. And we thank you.

Let me just very briefly summarize the statement that I have submitted on behalf of the court. It's an odd thing, I guess, for a court to come before a committee and seek needed changes. But I do this as part of what I consider my moral responsibility as chief judge of the court.

There are serious problems facing the ability of the court to function and to deliver justice to its litigants. And there are three categories that these problems come under.

I think it would be remiss of the court not to raise these problems, because they affect not so much the court, but the administration of justice and litigants who seek justice against the United States.

As we noted in our opening statement, our court is a unique court, it's a national court. It was the second court created—Court of Claims was the second court created after the district courts by the Congress pursuant to the powers under the Constitution. Where district courts were created pursuant to article III, the Court of Claims was created pursuant to article I.

The court has as its only defendant, the United States. All the plaintiffs represent citizens from every walk of life and having vir-

tually every type of claim—citizens of the United States, citizens of foreign countries, but all seeking justice against the United States.

I think it's a tribute to our democratic system that we provide a forum where citizens can seek relief against the Government, against the sovereign.

As such, one of the problems that this court faces is the independence of its judges. Since the United States is the defendant, there is a problem of apparent impropriety, because the United States also makes the appointments of judges.

The Department of Justice represents the defendant in every case before the Claims Court. Also the Department of Justice, of course, as it does with the rest of the judiciary, makes recommendations to the President on reappointment.

That creates an appearance of impropriety that I think is very very serious.

While I note it is the appearance of impropriety, the Department has exercised its responsibilities admirably and there's been not even a hint of actual impropriety, but our system of constitutional government is based not on whether people act right, but protections that go to the law.

And I think it's important and significant and a tribute that the Department has seen this problem itself and supports this bill as I think Mr. Markman will testify to later.

The Senate bill, S. 1608, would eliminate this appearance of impropriety by providing a firm tenure system so that a judge of the U.S. Claims Court, after the 15 years were up, would continue to receive salary as Tax Court judges do under the same system in return for seeking reappointment, for serving as a senior judge of the court and for giving up the opportunity to practice before the court and practice the kind of law the Claims Court deals with.

That system has worked effectively in the Tax Court. It has eliminated problems or impropriety. The general sense is that Tax Court judges continue to serve.

There is an incentive to reappoint Tax Court judges and I think the system has worked very effectively. And it was the initial model in a bill by, I believe, Senator Kennedy and Senator DeConcini for the Claims Court back in 1978.

A second problem deals with the salary of Claims Court judges. There are five article I courts.

All of the courts, except the Claims Court, the D.C. Superior Court, the D.C. Court of Appeals, the Court of Military Appeals, the Tax Court, and the Territorial Courts, are pegged to the salary levels of article III judges.

The trial courts, the article I courts, receive the same salaries as district judges. The appellate article I courts receive the same salaries as circuit courts. The only exception is the Claims Court.

The Commission on Executive, Legislative and Judicial Salaries, the Pay Commission or, the Quadrennial Commission, recommended as its only specific relative change that the Claims Court judges, because of the similarity of their functions, receive the same pay as those other courts.

And we hope that this committee will support S. 1608 which does that.

One of the effects of the current system is to say we're treating people doing the same task differently and I think that's not only irrational administratively, it's unfair.

The third point is the administrative structure of the court. This is the third problem that the court faces. The administrative structure is cumbersome and doesn't really work.

Currently, the Claims Court is under the administrative support and direction of the Administrative Office of the U.S. Courts, which in turn is under the direction of the Judicial Conference of the United States.

The anomaly of this is that the Claims Court is the only entity under the direction of the Administrative Office that is not represented on the Judicial Conference.

The Judicial Conference is composed of the Chief Justice of the United States, the chiefs of all the circuit courts of appeals, the chief judge of the Court of International Trade and one district chief judge from each circuit elected to represent the district courts.

Magistrates and bankruptcy judges serve on the committees of the Judicial Conference. No Claims Court representation exists on the Judicial Conference. And, yet, the Claims Court is governed by all of its directives.

Senate bill 1608 would change that by establishing the Claims Court as all the other article I courts are, except the Territorial Courts, under its own administration and responsible to the Congress of the United States.

This is not a new innovation, because the old Court of Claims was directly under the Congress for most of its 133-year history, until 1982, in fact.

And we are asking—and Senate bill 1608 restores what was a workable system.

The unworkable part of the current system is not based upon the Administrative Office of the U.S. Courts. They make every effort to provide us support. The people are good people, but the system doesn't work because it's too cumbersome.

I hope that this committee will favorably consider these changes, because they threaten not only the operation of the court, but the independence of the court and the perception the public has of our Government's commitment to doing justice against itself.

Mr. Chairman, I thank you very much for this opportunity to appear before the committee and for the fine work of your staff and the staff members of the committee and I will be happy to answer any questions that I can.

Senator HEFLIN. Senate bill 1608 places the judges of the Claims Court on a salary in parity with judges of the Tax Court. Is the salary for Tax Court judges tied statutorily to the salary of the U.S. district court judge?

Judge SMITH. Yes, it is, Senator.

Senator HEFLIN. So, in effect, that ties the salaries of the Claims Court to the U.S. district court judge salaries?

Judge Smith. Yes, it does, Mr. Chairman.

Senator HEFLIN. Currently under section 176 of title 28, Claims Court judges may be removed for incompetency, misconduct, ne-

glect of duty, engaging in the practice of law or mental or physical disability.

The U.S. Court of Appeals for the Federal Circuit has authority to remove a judge from the Claims Court, but only a majority of all of the judges of such courts concur in the removal.

This bill would change the removal provisions to allow removal by the President for inefficiency, neglect of duty or malfeasance in office. Why is this change in removal statute placed there and is it necessary?

Judge SMITH. Well, I don't think it's a pressing problem but for parallelism with the Tax Court, that's the exact provision of the Tax Court's removal position.

And there's probably some constitutional clarity. If an article I court shouldn't have its removal under the article III branch, probably the most consistent would be impeachment since the Claims Court is an article I court and the Congress should have its removal power.

I think the Congress may already have the ability to impeach Claims Court judges, so that may be unnecessary. But the Presidential removal power is to make it parallel with the Tax Court.

Senator HEFLIN. The lack of independence by the Claims Court is an argument in support of changing the reappointment process.

Are there any other mechanisms other than Presidential reappointment that might solve the independence question?

Judge SMITH. Well, there are, I guess, two other mechanisms that would solve that kind of problem. One mechanism would be life tenure under article I.

The old Court of Claims, for much of its history was considered an article I court. It had life tenure. And the effect of the life tenure, since it was an article I Court, was that it was not grounded in the Constitution, but grounded on statute.

That system appeared to work very well. In the 1950's the Congress declared that the article I Court of Claims was really intended to be constituted under article III and so that article I life tenure became article III life tenure. But that would be one approach.

I guess the approach that existed prior to 1982, which was what the Congress rejected, was creating an Administrative Court where, in effect, the trial commissioners were career employees of the civil service system. And, as such, they had career tenure.

They didn't have reappointment, but there were defects that appeared to come from that system as well.

Senator HEFLIN. One of the concerns raised in seek and removal from the oversight of the Administrative Office is that the Claims Court is not represented on the Judicial Conference.

Has the Claims Court sought such representation? If such representation were granted, would that alleviate some of the concerns raised on this issue?

Judge SMITH. It would alleviate some though not all of the concerns. In my discussion with Chief Justice Rehnquist, as head of the Judicial Conference, he, and I think other members of the Judicial Conference, have indicated real concern, with broadening the Conference to include a non-article III entity.

And that would create some significant problems, I think, in the Judicial Conference's views.

The Claims Court has, in going before the Committee on Judicial Improvements, raised that as an alternative and the committee did not seem to favor that as an alternative on the theory, I guess, that that wouldn't necessarily solve the administrative problems.

I think the administrative problems come not only because of lack of representation; though those certainly severely aggravate the administrative problems.

But they come because the Judicial Conference is designed for one kind of entity: for district courts, 95 of them, for 11 circuits, for almost 500 magistrates and bankruptcy judges, all in the article III system, all having different characteristics from the Claims Court.

And it doesn't make any sense for them to have a separate Claims Court division. It would just be inefficient and wasteful.

We have the ability to do our administrative actions. We have the ability, more effectively than a very large entity that looks at us and—would properly look at us as kind of an odd duck.

The other national courts that are article III, as well as article I, are all in their own administrative systems. The Court of Appeals for the Federal Circuit, the Court of International Trade, they're the two article III courts that have their own budgets outside of the Administrative Office.

Senator HEFLIN. What effect will the addition of the vaccine compensation cases have on the workload of the Claims Court?

Judge SMITH. That is a question that the court has been pondering. I have created a special task force to consider that particular act.

Chaired by Judge Marion Horn, the task force was promulgated by general order and with the purpose of developing as comprehensive a view as possible.

But I can give you preliminary readings that it may have a very severe and profound effect on the ability of the court to function.

The estimates of the number of additional cases that the court will receive range—and these are the good, hard estimates, between a 10-percent increase in our workload based on certain assumptions, to a 300-percent increase based on other assumptions.

The main critical assumption is whether the 5,000 or so retroactive cases that exist will be funded before October 1, 1988.

If those are funded, the court's workload will increase enormously, doubling or tripling by a year from now. If the retroactive cases are not funded, the court load will increase somewhere between 10 and 100 percent, depending on how many prospective cases are out there. No one really knows.

But it will be a significant effect, even at the very minimum, if all of the most optimistic projections occur, of how few cases there will be, at least optimistic from the administrative point of view. It will be a significant increase in workload.

Senator HEFLIN. Section 14 of this bill ties the provisions for retirement, retired pay and recall to those of the Tax Court. What exactly do these provisions authorize?

Judge SMITH. Well, the general scheme, for any more specifics, I'll have to consult Gary or Frank, but the general scheme that the Tax Court has is a statutory equivalent of life tenure.

It's a balancing of interests, it seems to me, of both the sovereign and the independence of the judge.

On the one hand, for a judge to be independent, as the framers of the Constitution knew, salary protection was a critical fact.

They saw in England the use of salary by the King as a way of controlling the judiciary and controlling the administration of government. And they wanted to prevent that.

So, they created this provision of article III.

The Tax Court system tries to functionally do that for Tax Court judges who are not article III judges. It gives the President the power not to reappoint a judge who has not been a good judge after 15 years.

On the other hand, the Tax Court provision does guarantee that judge his salary and his economic independence.

Senator HEFLIN. This bill authorizes the judges from the Claims Court to accept gifts and bequests of personal property for the purpose of aiding or facilitating the work of the court.

The Department of Justice, in its written testimony, raises some concern regarding the appearance of conflict. Would you comment on this subject in this section?

Judge SMITH. Yes, I had noted that. I don't think that's a serious problem. I think the Department of Justice raises a good point.

The two examples that I can think of immediately that would become useful for the court—recently we had a picture presented to us by the Bar Association of our former chief judge of the court and that picture was donated to the court.

We also have the donation of services mainly by law students and through internships and those are useful types of gifts.

I think the rules of ethics of the judiciary, that we're bound by, and the ethics in government law provide adequate protection against gifts being given to the court.

I think it's, per se, improper for any judge to receive a gift from some party that's litigating before that particular judge. And, so far, the only issues of gifts being given to the court have come from the Bar Association collectively, and, so, they don't raise the question of impropriety like this painting or gifts by students of their services as interns.

Senator HEFLIN. Well, does this gift thing extend to individuals or just to the court as a whole?

Judge SMITH. The provisions of the bill only extend to the court as the whole, the ability to accept gifts, presumably from the Bar Association. And I presume that would also cover gifts of services by law students and professors who are interning.

Senator HEFLIN. This bill repeals section 1926 of title 28, which currently authorizes the Judicial Conference of the United States to prescribe the fees and the costs to be charged in the Claims Court.

This legislation also provides for an increase in filing fees to $120 from $60, which is comparable to the fees charged in the district courts.

Is it contemplated that the fee structure will remain in parity with that of the district court?

Judge SMITH. Yes, it is. The Claims Court has, since its creation, patterned its structure, its rules, its procedures as closely as possi-

ble to a district court. And there's an important functional reason for that.

In order to be fair to the non-Washington practitioners who are not here and don't have the special ability to deal with the court every day—they know the district court procedures generally in every region in the country. And that makes it easier for them to deal with the Claims Court if everything is as close to the local district court.

Senator HEFLIN. In section 10 of this bill, it provides the court executive and all employees of the Claims Court shall be deemed officers and employees of the judicial branch.

What is the effect of this section if the Claims Court is no longer under the administrative authority of the Judicial Conference?

Judge SMITH. Well, that section, I think, should be slightly modified. The Administrative Office has expressed some concern that if employees of the Claims Court are deemed as employees of the judicial branch, they may have—the Administrative Office of the judicial branch, may have some obligations to the Claims Court employees, which I think is not intended by the bill and wouldn't be fair to the Administrative Office.

The intention of the bill was to create an easy way of developing personnel policies. The Claims Court has operated under these rules for a long time. It would just continue to use by reference the Judicial Conference's personnel rules.

So, rather than a small court having to create its own rules, we'd adopt the rules that they use to govern their employees.

Senator HEFLIN. Would the salary for these employees be the responsibility of the Claims Court or the judicial branch?

Judge SMITH. It would be the responsibility of the Claims Court. Or the Appropriations Committee, I guess, would give the Claims Court the money to pay the salaries.

Senator HEFLIN. Well, actually, they become entitlements, don't they? Well, they depend on appropriations, but salaries are generally concluded to be entitlements.

How does section 16, which concerns expenses for travel and subsistence, differ from section 456 of title 28, dealing with travel expenses of justices and judges?

Judge SMITH. I will defer for a moment to my colleagues. But as I understand the system, the travel regulations, again, would be kept exactly as they are now.

We now use the Administrative Office's regulations or the Judicial Conference's that are promulgated for all judges—they apply to Claims Court judges and staff. And we would adopt those regulations by reference.

One of the problems that we occasionally have in travel is the Administrative Office is forced to make some ad hoc determinations since Claims Court wasn't really included when the regulations were created.

So, we're for some purposes treated as a circuit court and our judges for the most part are treated the same as other district judges or Federal judges.

Senator HEFLIN. Section 2 of the bill would allow judges of the Claims Court, after they have completed a 15-year term, to serve until a successor enters on duty.

If enacted, would this provision be unique to the Claims Court and the Tax Court?

Judge SMITH. I think it would not be. I think it applies in the case of a number of administrative agencies. As far as a court, I believe it would, because the only courts that have that problem are Federal courts or the article I courts.

That provision was taken from the original legislation that set up the Claims Court. Originally, in 1982, that provision applied to the transition judges, those judges who would be—would serve until 1986 or 15 years, whichever came first.

And that provision was useful then and I think would be useful to continue. Because we've had a problem of losing a number of judges in the last few years.

And I've seen the stress that's placed upon the system, it's placed upon the litigants in cases, and caused backlogs, and I think that provision will be very useful to allow some kind of transition until the new judge comes on so that the party's cases aren't in limbo.

Senator HEFLIN. Are other judicial offices, such as bankruptcy judges and magistrates who serve for a limited term, permitted to remain in office until a successor takes the Bench?

Judge SMITH. I'm not sure whether they are or not. The one difference is, of course, bankruptcy judges and magistrates appointments can be made instantly. It can be made very promptly, because it doesn't require confirmation or the appointment process by the President or the confirmation by the Senate, which can involve delays and battles.

The district judge can make appointments of magistrates and the circuit council, bankruptcy judges. And that problem has never been a major problem. Those appointments, if they're needed quickly, can be made quickly.

Senator HEFLIN. I understand that the Claims Court is now located at the National Court Building in Washington. Does the Claims Court lease space from the GSA?

Judge SMITH. We lease space—I guess part of our budget—or the money from the Administrative Office, goes to GSA. And the Claims Court is one of two tenants in that building, as is the Court of Appeals for the Federal Circuit.

Chief Judge Markey and I are, I guess, the comanagers of the building. One of the more exciting hats I think I wear, particularly as seasons change or the pipes don't work, but maybe one of my more useful jobs.

Senator HEFLIN. Is there any problem of locking in the location of the court to the National Courts Building?

Judge SMITH. I don't think there is. Originally, the building was the Court of Claims Building, which was set up—and built for the Court of Claims and so it goes back to its origin as our court's headquarters.

And I wouldn't imagine that there would be any reason to change. It would cost a great deal of money to change. The building is adequate and it has a lot of tradition behind it.

Senator HEFLIN. Thank you. Senator Grassley?

Senator GRASSLEY. Thank you, Mr. Chairman. In your testimony on page 6, you referred to the fact that you're a part of no circuit.

Don't you consider yourself a part of the Court of Appeals for the Federal Circuit?

Judge SMITH. Well, for purposes of our jurisdiction we do, and I must say I do on an emotional basis. Chief Judge Markey is a long and old friend of mine and we work very closely together.

Senator GRASSLEY. They review all your cases, don't they?

Judge SMITH. They review all our cases, but for the normal administrative functioning of a circuit/district relationship, Judge Markey has said very clearly that we are not part of their circuit, that he doesn't have management responsibilities over us as a circuit council would over a district court.

All of our participation is really—other than jurisidictional—voluntary cooperation. We work with the court of appeals on their Judicial Conference, but that's purely a voluntary action.

Senator GRASSLEY. The chairman brought up the issue of the appointment process and reappointment and tenure and all that. I'm somewhat troubled by the bill's treatment of the reappointment process for Claims Court judges. It seems to propose what might be considered a functional equivalent of life tenure for non-article III judges.

I'd like to get your reaction to a couple of alternative approaches on the method of appointment. First, as in the case of the court of appeals selecting bankruptcy judges—what would you think about permitting the Court of Appeals for the Federal Circuit to make a judgment on reappointment? After all, they hear your appeals and they're familiar with the performance of Claims Court judges as a reviewing court.

Judge SMITH. Well, first I should stress that Judge Markey is one of my closest friends and the people on the court of appeals are all outstanding individuals.

But I think, as a constitutional matter, judges should not be in the business of appointing independent judicial officers, particularly ones who they review.

It would change significantly the function of our court if our judges were, in effect, working for the court of appeals judges.

The independence problem would be substituted and that, I think, was one of the reasons for creating an independent trial court rather than an adjunct to the Court of Appeals for the Federal Circuit. The old Court of Claims worked that way.

The trial judges were named by the appellate judges and they didn't have independence.

Senator GRASSLEY. Well, what about what I suggested with the bankruptcy judges. That doesn't seem to be a problem there.

Judge SMITH. It was a problem, at least enough to warrant the Congress to set up the bankruptcy judges initially as an independent article I court.

But the bankruptcy power is so closely tied to the power of district judges, since it really is an article III power, that that couldn't be done.

But it was a perceived problem for a long time, that the bankruptcy judges were really under the direction of the district judges and weren't independent judges.

Currently, the 14-year term is a compromise, but I think the bankruptcy system and the concerns of the bankruptcy judges,

which this committee partly addressed, in the bill that passed last night, indicates that that solution hasn't worked completely satisfactorily.

Senator GRASSLEY. I'd like to throw at you, in the form of written questions, a couple of other suggestions I have on the appointment of judges, and get your reaction in writing on them.

I would like to turn to another matter that the chairman touched on, and this refers to the salary situation and raising the salary to $89,500, the same as Federal district court judges.

Frankly, I think that making no distinction between an article III judge and an article I Tax Court judge may have been a mistake.

There is certainly a functional difference between these judges, a district court judge having to hear all kinds of cases, Federal questions, diversity cases, et cetera.

Tax Court judges on the other hand hear only those cases involving the interpretation of the Internal Revenue Code. And there is also a constitutional distinction between district courts and Tax Court judges.

My question is this, Why should I be persuaded that simply because the Ways and Means Committee or the Finance Committee made a mistake in granting this extra status to Tax Court judges, that Judiciary Committee ought to do the same thing with the Claims Court?

Isn't this really what the pay equity issue is all about?

Judge SMITH. Well, yes, it is. All the other trial courts—it isn't just a mistake that was made by one committee with respect to the Tax Court.

The D.C. Superior Court judges receive the same salary as the district court judges, as do the Territorial Court judges, the other two categories of article I trial judges.

So, all three other article I trial courts do receive the salary. So, the Claims Court is the only one that doesn't.

The second thing is virtually all the cases we handle could in other contexts be handled by district courts.

In the contract area, though, for example, if a case is under $10,000, it can be heard by the district court. If it's—the Tucker Act area—if it's over $10,000, it can only be heard by the Claims Court.

Our tax jurisdiction is coextensive with the district courts. We deal with numerous constitutional challenges. We have the same kinds of constitutional responsibilities as the district court does, but in different context.

Really the only two differences between a district court and the Claims Court is that in our cases the defendant is always the United States, and we don't have any criminal jurisdiction.

Otherwise, the civil cases we hear are some of the most complex facing any U.S. court.

Senator GRASSLEY. Senator Heflin and I have sponsored a bill, S. 1630, which—and by the way this has already passed out of our committee here—would improve the retirement benefits for bankruptcy judges and magistrates.

Would you be interested in being included in that package of benefits?

Judge SMITH. No, I think the court would not. I must say, no one, I guess, doesn't appreciate benefits. But that isn't the real problem. We have an independence and tenure problem, not a retirement problem.

Everyone would like more retirement. But our problem is that our judges now have a serious impropriety problem. At the end of their 15-year term, if they're not 65, they either have to be—appear to be currying favor with the Department of Justice, the defendant for reappointment or looking to the plaintiff's bar for a job.

And that's, I think, the nub of the problem and one that wouldn't be solved in any way by the provisions for bankruptcy judges or magistrates who really do not have a tenure and independence problem.

Senator GRASSLEY. My last question, and this is from the standpoint of your arguing for separation from the Administrative Office in terms of budget and administrative support, What about as an alternative? Could you support a provision that would bring you under the ambit of the Court of Appeals for the Federal Circuit?

And considering all the facts, again, they review all your cases, they get independent appropriation from Congress and they even share the same building with you——

Judge SMITH. Well, I think we work closely with them. I think there would be some problems with that administratively.

The system is small enough that there should be some separation between the two, particularly on the question of resources.

Since they are reviewing our cases, we have a cordial relationship, a personally friendly relationship. But, I think, once you start budgeting the two entities that are very different in their needs and concerns, you're bound to create inefficiencies.

I think budgeting should be coherent and that's why we don't fit into the Administrative Office. We don't fit into the Federal Circuit. Amalgamating us with the Federal Circuit would just create another kind of bifurcated structure.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you, Judge Smith. We appreciate your testimony.

Judge SMITH. Thank you very much, Mr. Chairman.

Senator HEFLIN. Without objection, the statement of Judge Loren Smith will be placed in the record in its entirety at this point.

[The prepared statement of Judge Loren Smith follows:]

TESTIMONY OF
LOREN A. SMITH, CHIEF JUDGE, UNITED STATES CLAIMS COURT

Mr. Chairman and members of the committee, on behalf of the United States Claims Court, its bench and bar, and the litigants whose claims it hears, I thank you for the opportunity to present this request for needed reforms for the Court. In so doing, I am also mindful of the very deep commitment on the part of this committee and its members to the fair and efficient administration of justice. In 1982, the Federal Courts Improvement Act launched our Court as the successor to the original jurisdiction of the old Court of Claims. Together with the new Court of Appeals for the Federal Circuit, under Chief Judge Howard Markey's great leadership, that Act has been viewed by the legal community as an outstanding success in innovative and efficient judicial structure by the Congress.

However, five years of experience under that legislation have made obvious some serious defects in the Claims Court's structure. These defects were difficult to anticipate in 1982. Now they seriously threaten to undermine the integrity of the Claims Court. They also pose a very serious obstacle to the effective operation of the Court at a time when the new National Childhood Vaccine Injury Act jurisdiction will place, in less than six months, extraordinary demands upon the Court. For these reasons, the Court urges the committee

to recommend favorable action on Senate Bill 1608, introduced by Senator Thurmond. This legislation would remedy the basic defects in the Court's structure which threaten the integrity and independence of the judicial process as well as its effectiveness and efficiency.

In the following few pages I will provide a brief background of the Court and short summaries of the three problems that will be corrected by Senate Bill 1608. These corrections are structurally quite simple, but will effectively guarantee the independence and effectiveness of this Court.

Background

The United States Claims Court is uniquely "The Citizen's Court." Its original jurisdiction was created in 1855 to deal with a major problem then confronting the Congress. Numerous citizens and groups were seeking remedies for wrongs committed by the United States Government. Since sovereign immunity barred legal redress, the only option for the citizen was a private bill before the Congress. This system led to numerous problems for the Congress. The creation of a court to do justice responded to a very basic democratic imperative: fair dealing by the Government in disputes between the Government and the private citizen.

As Abraham Lincoln noted: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals." This quote is carved into the stone front of the United States Claims Court.

This system, established 133 years ago, is now threatened. It is threatened by the appearance of a lack of real independence and the reality of an inefficient administrative system which militates against the private litigant.

Reappointment, Tenure and Independence

Currently, all Claims Court judges have a 15-year term, with no possibility of recall or pension until they are eligible for retirement, generally age 62. Thus, a judge who will not be 62 (most of the current judges) when his or her term ends must either seek reappointment from the President through the Justice Department (the defendant in suits pending before that judge) or a job from firms litigating before the Court on behalf of the plaintiffs. Either way, the result is unseemly and might be seen as undermining the most fundamental element of any judicial system: independence. This problem can be remedied by the salary system and mandatory recall provided in section 797 of S. 1608, modeled on the system that now so effectively

works for the Tax Court. The Tax Court is a particularly relevant model for the Claims Court since both are Article I courts under the Constitution with nationwide jurisdiction and have parallel jurisdictions in the tax area--the Claims Court having tax refund jurisdiction and the Tax Court having deficiency jurisdiction.

Pay Parity

Currently, Claims Court judges are the only federal judges, either Article I or Article III, to be paid less than U.S. District Court Judges. D.C. Superior Court, Tax Court and Territorial Court judges all receive the same salary as District Court judges, while judges of the Court of Military Appeals and the District of Columbia Court of Appeals receive pay parity with U.S. Circuit Court judges. The Commission on Executive, Legislative and Judicial Salaries (Pay Commission) specifically recommended this parity for the Claims Court judges in its most recent report in December of 1986. Since the Claims Court handles some of the largest and most complex tax, contract, patent and other monetary cases litigated in the federal court system, this current inequality is indeed ironic. Section 172(b) of S. 1608 would provide parity for the Claims Court judges with other Article I trial court judges.

Court Structure and Vaccine Injury Administration

Beginning in October of 1988, the Claims Court will begin hearing National Childhood Vaccine Injury Act cases. This jurisdiction was transferred from the 95 U.S. District Courts to the Claims Court on December 21, 1987. One of the reasons for this transfer was the constitutional concern of having these compensation cases heard in an Article III forum. Another was the desire for a court with national jurisdiction to administer this program effectively. Caseload estimates range from 10 percent increases in the Court's docket to over 300 percent increases in the coming year. At the minimum, the Act requires that the Court hire, supervise, and fund a core of special masters to deal with the cases. Additional lawyer, computer, and general and special administrative support will also be needed. Only Congress, through a direct appropriation and the proper budgetary process can ensure the effective implementation of this legislation. Currently, the Court cannot budget for this new jurisdiction since the Court has no budget. The October 1, 1988, implementation date makes it very urgent that the Court be placed on a firm and responsible administrative foundation.

Currently, the Claims Court's administrative functions are partially performed and overseen by the Administrative Office of the United States Courts under the direction of

the Judicial Conference of the United States. The Administrative Office and the Judicial Conference are designed to deal with over 1,000 Article III judges and other judicial officers and over 100 separate District and Circuit Courts having certain common characteristics. The Claims Court's 16 judges are currently the only group governed by the Judicial Conference, but excluded from its membership and any committee membership. The effect of this inconsistency is that members of a judiciary who have little knowledge of or time for the Court are passing on the basic administrative decisions which directly affect the Claims Court's administration of justice, such as computer priority, additional law clerks, administrative support staff, judicial pay requests, and even office equipment selection.

The Judicial Conference and the Administrative Office are well-suited to administer a large and relatively homogeneous system like the Article III system of 13 circuits, 95 districts, and several hundred Bankruptcy judges and Magistrates. This whole system is organized under the several circuits. By contrast the 16 judge Claims Court with its one location and national jurisdiction does not fit into this system. It is part of no circuit. Its judges are the only Article I officers in the system, with the exception of the two territorial judges (for most administrative purposes, they are functionally like District Court judges). The Administrative Office is forced

to deal in an ad hoc way with the Court on such different administrative matters as travel, retirement, personnel, jurisdiction, budget, and any matter prescribed by the Judicial Conference but not made directly applicable to the Claims Court. This leads to a cumbersome procedure for meeting the Court's, and hence the litigant's, needs.

Currently, the Court has no separate congressionally approved budget. The lack of fiscal responsibility denies the Court the ability to set its own management priorities and subsequently to be answerable to the Congress for them. Thus, enactment of those sections of S. 1608 designed to achieve administrative autonomy would fulfill the objectives of Congress and the needs of the litigants.

The Court and Its Jurisdiction

Sixteen presidentially appointed and Senate confirmed regular judges and two senior judges presently sit on the Court. These judges are generalists who have final judicial authority, appealable to the United States Court of Appeals for the Federal Circuit.

As a creation of the Federal Courts Improvement Act, the Claims Court assumed all the original jurisdiction of the old Court of Claims as well as several new areas of jurisdiction. This jurisdiction is national in scope and world-wide in potential forum, with judges travelling to the

locations most convenient to the parties in accordance with the Court's statutory mandate. The jurisdiction of the Claims Court includes:

- Federal tax refund suits - with an average value in excess of $100,000.00,
- Government Contract claims - exclusive court jurisdiction over all claims under the Contract Disputes Act, and over Tucker Act claims exceeding $10,000.00,
- Equitable relief - such as temporary restraining orders in the case of bid protests,
- Patent and copyright infringement suits - most of a highly technical and complex nature,
- Military and civilian pay cases,
- Indian claims - most have hundreds of litigants, numerous issues, and involve millions of dollars,
- Fifth Amendment taking claims - which allege that the U.S. has taken property, without just compensation, by flooding, regulation, etc.,
- Tris chemical compensation claims,
- Oil spill claims under the Federal Water Pollution Act,
- Congressional reference cases, and
- National Childhood Vaccine Injury Act cases (as of 10/1/88).

Conclusion

It is the Court's hope that this committee will support Senate Bill 1608, which makes three important structural improvements to the United States Claims Court.

1. Insulating the reappointment process from any threat or appearance of threat to the Court's independence. This is done by tenure provisions similar to those applying currently to the Article I Tax Court. See 26 U.S.C. § 7447 (1982).

2. Implementing the 1986 recommendation of the Commission on Executive, Legislative and Judicial Salaries to provide Claims Court judges with the same salary as all other Article I trial judges.

3. Providing the Claims Court with a firm administrative foundation by establishing it with an appropriation, a budget and independent administrative authority under the oversight of this committee and the appropriations committee.

S. 1608 would allow this Court to effectively fulfill its broad responsibilities and duties under its new vaccine injury jurisdiction as well as under its current jurisdictional mandates.

Senator HEFLIN. We call Mr. Stephen J. Markman of the Department of Justice.

STATEMENT OF STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. MARKMAN. Thank you, Mr. Chairman. I am pleased to be before you today to address S. 1608, a bill to amend title 28 of the U.S. Code, to alter a number of provisions dealing with the U.S. Claims Court.

As I explain in my testimony, many of the provisions of this bill pertain to the internal operations and administration of the Claims Court and as to those provisions that the Department of Justice does not take a position.

However, matters relating to the salaries and benefits of the judges of the Claims Court are of interest to the Department in view of the administration's efforts to recruit and appoint the highest caliber of individuals to serve as judges of all the courts of the United States.

The most significant change contemplated by the bills with respect to the tenure of the judges of the Claims Court. Currently, Claims Court judges are subject to the Civil Service Retirement System.

Section 14 of S. 1608 would amend title 28 to provide Claims Court judges with the same tenure and retirement benefits presently enjoyed by the judges of the Tax Court.

In brief, judges would be appointed for a term of 15 years and would eligible to be reappointed for a new term as a judge after completing a full 15-year term and giving notice that he or she would accept reappointment.

If not reappointed by the President to a new term, he or she would be entitled to retire, receiving full salary, subject to possible recall for limited service as a senior judge.

We support such a change to the present retirement system for Claims Court judges.

The Department recommends names to the President or reappointment to the Claims Court Bench and at the same time conducts the Government's defense in virtually all the case that come before the court.

While we firmly believe that there is no actual impropriety attached to the present circumstances and we are not aware of any allegations that there ever have been, we recognize that there are those who might suggest the appearance of a conflict of interest, potentially compromising the independence of the Claims Court judges, in this court. Especially where the defendant is always the United States, the judiciary must not only be independent, but must appear to be independent.

Adoption of the retirement system proposed in this bill would avoid any possible contention that the judges of the Claims Court are dependent for their retirement benefits upon recommendations for reappointment by the agency conducting the defense in the cases they hear.

Section 2 of S. 1608 would amend title 28 to raise the salaries of Claims Court judges, bringing them into line with the salary currently paid to the judges of the Tax Court.

This current discrepancy appears to be a vestige of the old trial examiner system of the Court of Claims that was not adequately dealt with by the reforms in 1982.

There is no evidence that Congress specifically intended the judges of the Claims Court to be second class judges in any way.

The judges of the Claims Court are Federal judges, quite analogous to the judges of other article I courts, such as the Tax Court and the D.C. courts and we see no sound reason why they should not be paid at the same level as most other trial level Federal judges.

S. 1608 would also remove the Claims Court from the oversight of the Administrative Office and place it directly under the budgetary and administrative control of Congress in response to concerns that have been expressed about the unique needs of the Claims Court.

The Department of Justice generally has not become involved with respect to the internal administration of the courts.

Indeed, as we are sure that these issues will be fully addressed by those more knowledgeable and involved in such questions, the Department will not presume to advise the Congress on these matters.

Therefore, we do not feel that it will be appropriate to comment upon this aspect of the bill.

Finally, Mr. Chairman, we have a number of miscellaneous comments that are contained in our statement. We object, for example, to that portion of the bill that would amend title 28 to provide for direct appeal from the Claims Court to the Supreme Court whenever the Claims Court found an act of Congress to be unconstitutional.

The Department of Justice and this subcommittee have supported legislation substantially limiting the scope of mandatory appeals to the Supreme Court from Federal district courts.

In addition, we do not read section 21 as allowing the taxing of costs for the purpose of funding the administrative costs of the Claims Court's new jurisdiction to hear claims for vaccine-related injuries pursuant to the Childhood Vaccine Injury Act of 1986.

In light of the very substantial number of experts that may be needed for implementation of this program, such costs could result in the need for significant augmentation of Claims Court operating funds.

If this is to be done, we believe it should be done by separate appropriation.

The Claims Court, in its first 5 years, has proven to be an outstanding success as a result of the support of this committee, the outstanding leadership of Chief Judge Smith and his predecessor Judge Kozinski, as well as the thoughtful and evenhanded work of its outstanding jurists.

The Department strongly believes that it has fully merited the equality and professional benefits that would be provided by this bill.

I would like to thank the subcommittee for the opportunity to express our views on this legislation. Thank you.

Senator HEFLIN. Thank you. What role does the Department of Justice play in the reappointment of article I judges generally and in the different categories?

Mr. MARKMAN. The principal article I court in which we participate in the judicial selection process is the Claims Court.

Decisions on the local District of Columbia Courts are made by the White House and decisions on the Tax Court are made principally by the Treasury Department.

Senator HEFLIN. The Department, by supporting this legislation, seems sensitive to the potential for conflict between the Department's role as a Defendant in Claims Court cases and the Department's role as a participant in the reappointment process. What steps has the Department taken to lessen the appearance of the conflict?

Mr. MARKMAN. Well, in addition to support this legislation, as you note, I would call your attention that most of the judicial selection responsibilities of the Department are coordinated by the Office of Legal Policy, which I currently head, while most of the litigation that takes place before the Claims Court is coordinated by our Civil Division or our Lands Division.

That's not to say that there's never any communication between these offices, but I think that at least lessens somewhat the appearance of impropriety.

And, again, I think we've tried to work hard to avoid any such appearance. And as I indicated in my statement, I don't believe that anybody has suggested that we failed in that effort.

Senator HEFLIN. Mr. Markman, you have stated that because of the special status of the Claims Court, life tenure would be inappropriate for Claims Court judges. However, isn't that the result of this legislation?

Mr. MARKMAN. Well, there's a difficult balance involved in this process as you know, Senator. And there were a number of options that were available to the Department and to this committee.

In our view, life tenure is an extraordinary situation. Obviously, life tenure is a circumstance that maximizes the value of judicial independence and that's a very important value.

But there are other values and where it's not constitutionally necessary to provide such lifetime tenure as it in the case of the article III courts, we think those other values need to be taken into account. Some of those values are: the infusion of new blood periodically on the courts, the opportunity occasionally to evaluate members of the Bench; and the idea of accountability—not accountability in the narrow sense of looking at individual case decisions—but evaluations and accountability in the larger sense—are judges working hard, are they turning out a good product, are they conscientious, are they meeting with the approval of those who appear before the court?

There are many institutions of the Government that provide quasi-judicial responsibilities that don't have lifetime tenure.

In addition to the Claims Court, examples include the Federal Trade Commission, FERC, a variety of administrative agencies.

In the case of the Claims Court, we feel that a 15-year term is one sufficient to help provide some balance in this process.

It's long enough for the judges to become expert in their subject matter. It's long enough, we think, to give them a sufficient measure of independence.

At the same time, we think there are some other values that need to be taken into account.

Senator HEFLIN. Section 25(b) in this act states, nothing in this act shall be construed to change or affect the jurisdiction of the U.S. Claims Court. But section 8 of the bill removes the Claims Court from the courts listed in section 610 of title 28.

Now this section 1631 of title 28 which authorizes the transfer of cases to cure jurisdiction and avoid dismissal of a case lies only in the courts listed in section 10.

What is the affect of this on the jurisdiction of the Claims Court?

Mr. MARKMAN. I'm sorry, Senator, I wouldn't be able to answer that. If I could take a look at that——

Senator HEFLIN. Well, maybe you could do this in writing.

Mr. MARKMAN. If I could report back, I would appreciate that.

Senator HEFLIN. Fine.

You raised concern in your statement about the cost of tax to litigants in the compensation of court-appointed experts, which is authorized to be taxed as cost on section 1921(c).

As you point out in your statement in the vaccine cases, there may be significant costs associated with the use of experts. Would you comment on this provision?

Mr. MARKMAN. Yes, Senator. As you know, the Department and the administration had some difficulties with the Childhood Vaccine Injury Act in the first place.

But putting that aside, we think that the best way for Congress to deal with this matter is to explicitly and above board appropriate whatever monies are necessary to pay for the kinds of expert advice that the Claims Court is going to have to rely on for this process rather than allowing the Claims Court directly to tax this under—in the context of sections 1920 and 2503. We think that would be the preferred course of action.

Senator HEFLIN. Without objection, the statement of Mr. Stephen J. Markman will be placed in the record in its entirety.

Thank you, Mr. Markman. We appreciate your testimony. You may have some question submitted in writing to you. Senator Grassley will want to.

Mr. MARKMAN. Yes, sir, I will respond to the questions.

[The prepared statement of Mr. Stephen J. Markman follows:]

STATEMENT OF STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to address S. 1608, a bill to amend Title 28 of the United States Code to alter a number of provisions dealing with the United States Claims Court. As I explain below, many of the provisions of this bill pertain to the internal operations and administration of the Claims Court, and as to those provisions the Department of Justice does not take a position. However, matters relating to the salary and benefits of the judges of the Claims Court are of interest to the Department, in view of the Administration's efforts to recruit and appoint the highest caliber of individuals to serve as judges of all of the courts of the United States.

A. The Current Structure of the Claims Court.

The United States Claims Court was established in 1982 by the Federal Courts Improvement Act of 1982, 28 U.S.C. § 171 (1982) ("FCIA"). The FCIA abolished the United States Court of Claims, which had existed since 1855. The old Court of Claims was divided into a trial division and an appellate division. Trial examiners would try a case, but had no authority to enter a final judgment. The appellate division, staffed by Article III judges who enjoyed life tenure, would then either accept the trial examiner's recommendations, or not, and enter a final

judgment accordingly. Appellate review was directly to the Supreme Court. The FCIA replaced this system with one more like the general federal court system of district courts and circuit courts of appeal. Cases are now tried in the United States Claims Court, which is staffed by Article I judges who have the authority to enter final judgments and, in some cases, grant equitable relief. Appeals can then be taken to the United States Court of Appeals for the Federal Circuit, an Article III court whose judges, as the Constitution requires, enjoy life tenure. (The FCIA combined the seven appellate judges of the old Court of Claims with the five judges of the former Court of Customs and Patent Appeals to form the Federal Circuit).

The jurisdiction of the Claims Court is limited, with most cases falling into one of nine areas -- government contract disputes, patent infringement claims against the United States, claims for compensation for government takings of private property, suits for federal income tax refunds, military and civilian government employee pay disputes, Indian claims, Tris chemical compensation claims, oil spill claims under the Federal Water Pollution Act, and congressional reference cases. 1/ Unlike the district courts, the defendant in the Claims Court is

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1/ In the Vaccine Compensation Amendments of 1987, Congress vested in the Claims Court jurisdiction to hear claims for vaccine related injuries pursuant to the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 et seq. That compensation scheme is scheduled to take effect on October 1, 1988.

always the United States government, and the Department of Justice almost always represents the United States. In this respect, the Claims Court is similar to the United States Tax Court, which hears tax disputes in which the United States is always the respondent and the litigation is conducted by the Department of the Treasury, which also makes recommendations to the President regarding the appointment of new judges.

B. The Tenure of Claims Court Judges.

The most significant change contemplated by the bill is with respect to the tenure of the judges of the Claims Court. Currently, Claims Court judges are subject to the civil service retirement system. They are appointed by the President, and confirmed by the Senate, for a term of fifteen years. If a judge's term expires before he or she can retire under the normal civil service rules, 2/ the judge is accorded no immediate retirement benefits; such retirement benefits would be available only if the judge was reappointed by the President then in office and served until the normal retirement age.

2/ Civil service employees, including Claims Court judges, are eligible for immediate retirement benefits at age 55 after 30 years' government service, at age 60 after 20 years' service, or at age 62 after 5 years' service, with a pension determined according to the length of service and recent salary levels. Judges with at least 5 years' service but not eligible for immediate retirement benefits may be eligible for a "deferred" pension based on their federal service that would begin at age 62.

Section 14 of S. 1608 would amend 28 U.S.C. § 797 to provide Claims Court judges with the same tenure and retirement benefits presently enjoyed by the judges of the Tax Court. In brief, judges would be appointed for a term of 15 years, and would be eligible to be reappointed. If a judge, after completing a full 15 year term and giving notice that he or she would accept reappointment, is not reappointed by the President to a new term he or she would be entitled to retire, receiving full salary, subject to possible recall for limited service as a senior judge. (See 26 U.S.C. § 7447 with respect to the judges of the Tax Court.)

We support such a change to the present retirement system for Claims Court judges. The Department of Justice recommends names to the President for appointment, or reappointment, to the Claims Court bench, and at the same time conducts the government's defense in virtually all of the cases that come before the Court. While we firmly believe that there is no actual impropriety attached to the present circumstances governing appointments to the Claims Court, we recognize that there are those who might suggest the appearance of a conflict of interest potentially compromising the independence of the Claims Court judges -- a situation that can hardly be expected to inspire the public with confidence in the quality of justice dispensed by the United States where it is a litigant. In this court especially, where the defendant is always the United

States, the judiciary must not only be independent, but must appear to be independent. Adoption of the retirement system proposed in S. 1608 would avoid any possible contention that the judges of the Claims Court are dependent for their retirement benefits upon recommendations for reappointment by the agency conducting the defense in the cases they hear.

Granting the Claims Court a retirement system similar to that of the Tax Court -- both of which are constituted under Article I and hear exclusively specialized cases against the United States -- would seem to address any concerns about the independence of Claims Court judges, the uncertainty of their retirement benefits or their position security without the need to take the substantial, undesirable step of granted them life tenure, converting the Claims Court into an Article III court. 3/

In view of the special status of the Claims Court, with its jurisdiction limited to very specialized types of cases, and the justiciability of most of these cases depending upon the waiver of sovereign immunity by the federal government, it would be inappropriate to grant life tenure to its judges. Moreover, granting life tenure would substantially limit the flexibility of Congress in altering the size and jurisdiction of the Court in

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3/ It should also be noted that section 4 of the bill would amend 28 U.S.C. § 176 to allow the removal of Claims Court judges for the same reasons as Tax Court judges may be removed, again bringing the judges of the Claims Court into line with those of the most closely analogous Article I court.

response to changing caseloads. 4/ Finally, one particular sort of case handled by the Claims Court, the congressional reference case, could not be handled by a court constituted under Article III, since an advisory opinion is called for. The Claims Court has performed admirably as an Article I court over the last five years. Such a major change in its structure and composition is simply unnecessary.

C. The Salary of Claims Court Judges.

Section 2 of S. 1608 would amend 28 U.S.C. § 172 to raise the salaries of Claims Court judges, bringing them into line with the salary currently paid to the judges of the Tax Court. Currently, the judges of the Tax Court, as well as of the United States Territorial Courts, the courts of the District of Columbia, and the United States Court of Military Appeals (all constituted under Article I like the Claims Court), are paid $89,500 per year, the same amount as judges sitting on the United States District Courts. The judges of the Claims Court, however, are paid $82,500. This discrepancy appears to be a

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4/ Further, restructuring the Claims Court under Article III could mean a much smaller court. According to the Judicial Improvements Subcommittee of the United States Judicial Conference Committee on Court Administration, "it will be impossible to support the creation of 16 Article III judgeships to handle the court's current caseload using existing Judicial Statistics Subcommittee standards." Draft Report to the Judicial Improvements Subcommittee of the United States Judicial Conference Concerning a Proposal to Restructure the United States Claims Court, p. 32 (Apr. 1987)

vestige of the old trial examiner system of the Court of Claims that was not adequately dealt with by the FCIA in 1982.

There is no evidence that Congress specifically intended the judges of the Claims Court to be "second class" judges; indeed, there is little evidence that the 97th Congress, in passing the FCIA, gave this particular question much thought at all. The legislative history indicates that it was mostly concerned with the new Court of Appeals for the Federal Circuit. 5/ The judges of the Claims Court are federal judges quite analogous to the judges of other Article I courts such as the Tax Court and the D.C. courts, and we see no sound reason why they should not be paid at the same level as most other trial level federal judges.

The Department of Justice generally has had only limited involvement in salary matters for judicial officers. While this is ultimately a matter for decision by the Congress, we see no reason to oppose bringing the salaries of Claims Court judges into line with those of their judicial peers.

D. The Claims Court and the Administrative Office.

The Claims Court is currently under the administrative oversight of the Administrative Office of the United States Courts. The Administrative Office administers almost all of the

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5/ Id. at 2-3.

United States Courts, under the supervision of the Judicial Conference of the United States. The Judicial Conference is made up of the chief judge of each federal circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. 28 U.S.C. § 331 (1982). Thus, while the Judicial Conference governs the administration of the Claims Court, the judges of the Claims Court have no representation in its councils. They, together with bankruptcy judges and magistrates, 6/ are the only group who are governed by the Judicial Conference, but who lack a direct voice in that body.

S. 1608 would remove the Claims Court from the oversight of the Administrative Office and place it directly under the budgetary and administrative control of Congress, in response to concerns that have been expressed about the unique needs of the Claims Court. 7/ The Department of Justice, while intensely interested in questions of law reform and the role of the judiciary in the scheme of government adopted in the Constitution, generally has not become involved with respect to the internal administration of the courts. Indeed, as we are sure that these issues will be fully addressed by those more

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6/ Congress in 1978 voted to give bankruptcy judges representation on the Judicial Conference, effective in 1984, but that amendment was eliminated before it took effect. See 28 U.S.C. § 331 note.

7/ The Court of Appeals for the Federal Circuit was excepted from the budgetary oversight of the Administrative Office by the FCIA, and is currently under the oversight of Congress, as the Court of Claims once was. See 28 U.S.C. § 605 (1982).

knowledgeable and involved in such questions of administration and the internal organization of a co-equal branch of government, the Department will not presume to advise the Congress on these matters. Therefore, we do not feel that it would be appropriate to comment upon this aspect of the bill.

E. Other Changes Concerning the Claims Court.

We do, however, have the following comments to make with respect to specific proposed changes to the jurisdiction and powers of the Claims Court.

The Department objects to that portion section 21 of S. 1608 that would amend 28 U.S.C. § 1252 to provide for direct appeal from the Claims Court to the Supreme Court whenever the Claims Court found an Act of Congress to be unconstitutional. The Department of Justice has supported legislation substantially limiting the scope of mandatory appeals to the Supreme Court from federal district courts. 8/ We do not favor the expansion of such mandatory appeals from the lower courts, and believe that any such judgment by the Claims Court should be reviewed through the ordinary appellate process by the United States Court of

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8/ See Testimony of Assistant Attorney General Stephen J. Markman Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, United States House of Representatives, Concerning H.R. 3152, the Court Reform and Access to Justice Act of 1987 (Oct. 14, 1987).

Appeals for the Federal Circuit, subject of course to the Supreme Court's authority to grant certiorari before judgment by the court of appeals in those few cases where an immediate decision by the Supreme Court is appropriate.

Section 21 of S. 1608 raises another concern because it would amend 28 U.S.C. § 2503 to include the Claims Court as a "court of the United States" pursuant to 28 U.S.C. § 1920, the section that defines what costs may be taxed against litigants by the federal courts. Paragraph (6) of section 1920 allows the compensation of court-appointed experts to be taxed as costs. We do not read section 21 as allowing the taxing of costs for the purpose of funding the administrative costs of the Claims Court's new jurisdiction to hear claims for vaccine related injuries pursuant to the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 et seq. In light of the very substantial number of experts that may be needed for the implementation of this program, such costs could result in the need for significant augmentation of Claims Court operating funds. If this is to be done, we believe it should be done by separate appropriation.

Finally, we also have some concern about the portion of section 13 of S. 1608 that would amend 28 U.S.C. § 796 to allow the Claims Court to accept direct gifts and bequests of personal property "for the purpose of aiding or facilitating the work of the court." The Claims Court is a small court, with a very

specialized caseload, and a relatively small practicing bar. It is not impossible that the acceptance of such gifts could, in a particular case, create the appearance of bias or impropriety. Accordingly, some appropriate limitation on the acceptance of gifts where a question of impropriety may arise would seem advisable, particularly with respect to gifts from active members of the Court's bar.

I would like to thank the Subcommittee for the opportunity to express the Department's views on this bill, and I will be pleased to answer any questions you may have.

Senator HEFLIN. Next is a panel with Mr. Clarence T. Kipps, Jr., chairman, U.S. Claims Court Advisory Council, and Randolph W. Thrower, president of the U.S. Claims Court Bar Association. We are delighted to see you, gentlemen.

STATEMENTS OF A PANEL CONSISTING OF CLARENCE T. KIPPS, JR., CHAIRMAN, U.S. CLAIMS COURT ADVISORY COUNCIL, WASHINGTON, DC; AND RANDOLPH W. THROWER, PRESIDENT, U.S. CLAIMS COURT BAR ASSOCIATION, ATLANTA, GA

STATEMENT OF CLARENCE T. KIPPS, JR.

Mr. KIPPS. Mr. Chairman, members of the committee, my name is Clarence Kipps and I am chairman of the U.S. Claims Court Advisory Council.

I am pleased to be here today to testify on behalf of the council in support of S. 1608.

The advisory council was created in 1982 and is composed of 29 distinguished members of the private and Government bar and the court.

In addition to assisting the court in its Judicial Conferences, rules, legislative matters, and other policy matters, the council provides a forum for the development and discussion of ideas on how the court can improve dispensing justice.

I am a member of the law firm of Miller & Chevalier and I testified before this committee in support of the Federal Courts Improvement Act of 1982, which created the Claims Court and the Court of Appeals for the Federal circuit.

In the bar's efforts in 1982 to have the claims court created as an article III court, we failed to sufficiently focus on adequately structuring the court as an article I court.

S. 1608 will comprehensively restructure the Claims Court into an effective article I court.

One of the most important critical improvements is to increase the compensation of the Claims Court judges to that of the Tax Court and district court judges and other article I judges.

The Claims Court is discharging precisely the same functions which the old Court of Claims, article III court performed for over 100 years.

These judges are also performing the same functions that district court judges perform in monetary cases, except that this court is given the responsibility of dealing with the most complex and largest cases.

S. 1608 recognizes, that in order to attract and retain the high quality of people that we need to serve on this Bench, it is necessary compensate the judges at least equal to that of the district court judges.

The present reappointment process presents serious problems. S. 1608 would solve these problems by adopting the Tax Court system of providing for continued salary and mandatory service for the person when he or she has reached the end of the 15-year tenure.

That system has worked well for the Tax Court and I think it will work well with the Claims Court.

Finally, and very important, is that the Claims Court should be given the responsibility of administering its own affairs under the oversight of this committee and that of the Appropriations Committee.

This court has a great charter. It's under dynamic leadership and it should be given a freer hand in developing the administrative support necessary to efficiently carry out its functions. Thank you, Mr. Chairman.

Senator HEFLIN. Without objection, the statement of Mr. Clarence T. Kipps, Jr., will be placed in the record in its entirety at this point.

[The prepared statement of Mr. Clarence T. Kipps, Jr., follows:]

TESTIMONY OF

THE UNITED STATES CLAIMS COURT ADVISORY COUNCIL

BY

CLARENCE T. KIPPS, JR.

My name is Clarence Kipps and I am Chairman of the United States Claims Court Advisory Council. I am pleased to present the testimony of the Advisory Council in support of S. 1608. The Advisory Council was created in 1982 and is composed of 29 distinguished members of the private and Government bar and the Court. It is national in scope and spans the major areas of the Court's jurisdiction. In addition to assisting the Court on its judicial conferences, rules, legislative and other policy matters, the Council provides a forum for the development and discussion of ideas that will aid the Court in dispensing justice.

I am a member of the law firm of Miller & Chevalier, Chartered. I was a law clerk at the Court of Claims more than 30 years ago and have been an active practitioner before that Court and the Claims Courts. I testified before this Committee in support of the Federal Courts Improvement Act of 1982 which created the Claims Court and the Court of Appeals for the Federal Circuit.

The Claims Court inherited the national jurisdiction of the Court of Claims plus some added by Congress. That jurisdiction includes tax, government contracts, just compensation, Indian, patent, civilian and military pay, vaccine

injury, Congressional reference, and other claims against the United States. These claims vary from a few thousand dollars to sums exceeding $100 million.

The Claims Court is an Article I Court composed of Chief Judge Smith and 15 other judges appointed by the President and confirmed by the Senate. In the Bar's efforts in 1982 to have the Claims Court created as an Article III court, we failed to sufficiently focus on the effective structuring of the Court as an Article I court.

S. 1608 will comprehensively restructure the Claims Court into an effective Article I court. One of the most critical improvements is to increase the compensation of the judges to the level of the U.S. Tax Court and District Court judges. The Claims Court is discharging the very functions which the Article III Court of Claims was discharging. The judges on the Claims Court are also performing the same functions as District Court judges on monetary claims against the United States and, in addition, are handling the largest and most complex cases. In its Report the Commission on Executive, Legislative and Judicial Salaries states: "We are recommending salary parity between the U.S. Claims Court and the U.S. District Court in recognition of job similarity." S. 1608 recognizes that, to attract and retain highly qualified judges, the pay of the Claims Court judges must be increased to the same level as the Tax Court and District Court judges.

S. 1608 also addresses the serious problem of the

reappointment process. In the typical appointment, the 15-year term expires before the judge is eligible for or wants to retire. Reappointment is dependent in large part on the support of Department of Justice and the private lawyers who litigate before the judge. Such an environment tends to undercut the independence of the judge especially near the end of the 15-year term. Moreover, the failure to provide assurance of either reappointment or continued compensation is counterproductive to attracting and retaining highly qualified judges. S. 1608 provides for independence of the judges and better tenure by adopting "the life salary with mandatory recall system" which Congress established for the Tax Court years ago.

Finally, and very important, S. 1608 provides that the Claims Court shall have direct responsibility for the administration of the Court with its own appropriations and budget under the oversight of this Committee and the Appropriations Committee. The present system is too cumbersome and the Claims Court is neither fish nor fowl in that system. This Court has an enormous charter and can undertake more. It can handle the recently acquired vaccine injury cases in the manner intended by Congress, but only with funds for and flexibility in administration. The Court is under dynamic leadership and S. 1608 will give the Court a greater hand in efficiently shaping the administration of Justice.

The Advisory Council would be pleased to work with the Committee in the enactment of S. 1608. Thank you.

STATEMENT OF RANDOLPH W. THROWER

Mr. THROWER. Mr. Chairman, my name is Randolph W. Thrower. I am a member of the law firm of Sutherland, Asbill & Brennan of Atlanta and Washington.

Over the years, other partners and I have had many cases before the Claims Court and its predecessor court, the Court of Claims.

I've been honored and privileged to be selected and to serve as the first president of the Bar Association of the Claims Court, which was organized last spring.

The Claims Court adjudicates claims against the United States in the diverse areas that have been mentioned, public contracts, tax cases, land takings, Indian claims, civilian and military pay, intellectual properties, and others.

It also serves as an advisory court to the Congress. It's new jurisdiction in the vaccine cases has been mentioned. Thus the court has heavy responsibilities and it demands the very best people available to serve.

The aim of the Bar Association has been to provide a forum for lawyers in private practice and in Government practice in these diverse areas to come together and to work together with the members of the court in the interest of the court.

The aim, briefly, is to establish the collegial and professional relationships that are so traditional with courts of this country.

And I think it has been very successful in its moves in that direction during this past year. We've been very much impressed, Mr. Chairman, with the quality of the members of the court and with the commitment that they are making to strengthen the court in every way.

For these reasons, the Bar Association very strongly supports S. 1608.

The Bar Association has members throughout the country. It now has around, I believe, 250 members. It is growing and has been well received and is serving the members—the practitioners before the court.

As has been indicated, the 1982 improvement bill simply left some gaps that need to be covered.

The Bar Association is principally interested in three or four aspects or segments of the bill. The first deals with compensation.

Lawyers have long recognized that a capable, committed lawyer in private practice generally can earn far more in financial compensation than is provided for members of the court. That disparity cannot be removed, but it ought to be reduced whenever the circumstances permit. We believe that it would be quite appropriate to put the basis of compensation for the judges of the Claims Court on the same basis as for those of the Tax Court.

I have had a lot of practice in the Tax Court and have extensive experience with the court. I have a high regard for its judges. I do not see any basis, however, for the significant difference in compensation that does exist.

In many ways, extreme demands are made on the Tax Court judges. The volume of cases is extremely high. In other ways, the Claims Court judges with their diverse areas of responsibility have great demands upon them.

The bill will put them both on the same basis, which we think would be appropriate.

We also believe that it is important to have the assurance of limited tenure which this bill provides. I would relate this to the condition, say, of a judge of the Claims Court that is fulfilling his 15-year term at the age of 58. He has two children in college. It's quite late for him to begin a new career. There's a gap between 58 and the time when he would be entitled to his retirement benefits.

His sense of insecurity would be great. His dependence upon the litigants before him, the lawyers before him, for support, and particularly upon the Department of Justice, would be tremendous, and unavoidably so.

We believe that the judges will be given a greater spirit of independence if the provisions of this bill are adopted.

As to the administrative provisions, these have been covered in earlier testimony. Frankly, I have looked upon the Claims Court as an orphan in its present administrative status.

It is an anomaly in effect, an appendage, under the authority of the Administrative Office of the Courts. That is not a natural home.

It provides for the Administrative Office of the Courts an exceptional kind of court that it is not accustomed to deal with. We believe that the court will operate much more effectively and efficiently if it is given responsibilities, again, comparable to those of the Tax Court.

I want to express for myself, Mr. Chairman, and for the members of the association, our appreciation for this opportunity to be heard before you. Thank you, sir.

Senator HEFLIN. Without objection, the statement of Mr. Randolph W. Thrower will be placed in the record in its entirety at this point.

[The prepared statement of Mr. Randolph W. Thrower follows:]

TESTIMONY OF

THE UNITED STATES CLAIMS COURT

BAR ASSOCIATION

BY

RANDOLPH W. THROWER

Mr. Chairman and Members of the Subcommittee:

My name is Randolph Thrower. I am a partner in the law firm of Sutherland, Asbill, and Brennan, and am currently President of the United States Claims Court Bar Association. I am pleased to present testimony on behalf of the Association on S. 1608, the "United States Claims Court Improvement Act of 1987."

The United States Claims Court was established by the Federal Courts Improvement Act of 1982. The Claims Court Bar Association was organized early last year to serve the needs of this new Court and the lawyers who practice before it. Over 245 lawyers have joined the Association in its first year; these lawyers come from all areas of the country and from all practice areas within the Claims Court's jurisdiction. The Claims Court Bar Association provides a common forum for these different practice groups and creates opportunities for ongoing dialogue between the Bar and the Court, between Government counsel and private practitioners, and between law firm and corporate counsel.

The Association and its members want a Claims Court that is strong and independent. We recognize that the strength and independence of the Claims Court depends upon

fair compensation and financial security for its judges. Without fair compensation and financial security, the Claims Court cannot continue to attract and retain well-qualified men and women to serve as judges. The Claims Court Bar Association is therefore vitally interested in legislation that would affect the compensation of the Claims Court judges.

The members of the Claims Court Bar Association strongly support S. 1608, the "United States Claims Court Improvement Act of 1987." The bill would fill in significant gaps left by Congress when it created the Claims Court in 1982. It would strengthen the independence of the Claims Court by providing the Claims Court judges the same compensation and retirement benefits as are provided judges of the United States Tax Court. The bill would also remove other disparities that currently exist between the Claims Court and other Article I courts, including the Tax Court.

The compensation and retirement pay provisions of S. 1608 lie at the heart of the bill and are of the greatest interest to the Association's members. The Claims Court judges currently earn less than the judges of any other Article I court, including the other Article I court of national jurisdiction, the Tax Court. That is patently unfair. As a tax practitioner for many years, I have represented clients in tax cases both before the Claims Court and the Tax Court. My experience has been that the tax cases heard by the Claims Court are equally as complex and equally as challenging as those heard by the Tax Court. The only difference is that the taxpayer in the Claims Court has paid a tax and is seeking a refund, while the taxpayer in the Tax Court has not yet paid the contested tax. This distinction

cannot justify paying Claims Court judges less than Tax Court judges.

S. 1608 would correct this disparity by making the salaries of the Claims Court judges equal to those of the Tax Court judges. The Claims Court's jurisdiction is, of course, not confined to tax cases but includes other important categories of financial claims against the United States, including public contracts, the taking of lands, civilian and military pay, intellectual properties, Indian Claims, and the like. It is the sole court having nationwide trial jurisdiction over claims against the United States in each of these important areas of the law.

Compensating Claims Court judges at the same rate as Tax Court judges is consistent with Congress' intent when it created the Claims Court in the Federal Courts Improvement Act. Congress at that time left the determination of the Claims Court judges' salaries to the President's Commission on Executive, Legislative, and Judicial Salaries. When the Pay Commission issued its report in December 1986, it stated that "[w]e are recommending salary parity between the U.S. Claims Court and the U.S. District Court in recognition of job similarity." Report of the Commission on Executive, Legislative, and Judicial Salaries, December 15, 1986, p.5. Because Tax Court judges are currently paid the same salary as District Court judges, S. 1608, by giving Claims Court judges parity in compensation with Tax Court judges, would effectively implement the Pay Commission's recommendation.

The provisions of S. 1608 concerning retirement pay are equally as important as its compensation provisions. A

Claims Court judge is appointed by the President for a term of fifteen years. In the event the President decides not to reappoint him, he would not be eligible for retirement pay until he reaches age 62 at the earliest. Consequently, a judge nearing the end of his term who has not yet attained age 62 faces the prospect of having to seek employment if he is not reappointed. This can create an awkward and potentially embarrassing situation for the judge as well as for the parties who appear before him, many of whom may play a role in the reappointment process. This situation is fundamentally at odds with the notion of judicial independence that is central to our legal tradition.

S. 1608 would remedy this situation by making Claims Court judges who were not reappointed eligible for retirement pay as is currently the case for Tax Court judges. In order to receive such benefits, the judge must be willing to accept reappointment and to serve at least 90 days a year in a senior judge capacity.

S. 1608 would also strengthen the independence of the Claims Court by removing it from the supervisory authority of the Administrative Office of the United States Courts and providing it executive authority over its own operations. The Claims Court, which is not represented on the Administrative Conference, is the only Article I court that is subject to the Conference's supervision. S. 1608 would remove this anomaly by giving the Claims Court the same operational and administrative autonomy as is currently enjoyed by the Tax Court.

Finally, S. 1608 contains a number of provisions

that we believe will improve the administration of justice by the Claims Court. For example, the bill would authorize the Chief Judge of the Claims Court to appoint a court executive to assist him in the administration of the Court's day-to-day business. The bill would also permit a judge to remain until his successor takes office as opposed to leaving the seat vacant at the end of his term, as is currently required.

In conclusion, the members of the Claims Court Bar Association view S. 1608 as an important piece of legislation that would strengthen the independence and efficiency of the Claims Court. We strongly urge its adoption.

On behalf of the Claims Court Bar Association and its members, I appreciate the opportunity to appear before this committee and would be pleased to answer any questions. Thank you.

Senator HEFLIN. Mr. Kipps, your testimony stated that this S. 1608 will enhance independence of the Claims Court judges by adopting the life salary with the mandatory recall system, which Congress established for the Tax Court. Do you or Mr. Thrower know what the rationale was for establishing such a system for the Tax Court?

Mr. KIPPS. Mr. Chairman, part of the rationale was the concern of obtaining a reservoir of people to go on the Tax Court and part of our reason for supporting it here for the Claims Court, to develop a reservoir of people, really well qualified.

If we cannot elevate either of those courts to that of article III, which is what I've urged for years, with respect to the Claims Court, we want the next best thing.

We want to be able to attract the people on the front end to take the position. And it's very difficult to do that when you're looking at a tenured position and that tenure expires at a point where the practitioner has given up his entire livelihood in the practice of law.

He's given up his opportunity to seek other governmental jobs or appointed positions, because he's taken himself really out of the market.

And he's there, then, totally dependent for his future on the good graces of the appointing authority.

And we find that an undesirable characteristic on the front end. And we also don't like to see the judge put in that posture when his tenure does run out.

I think it is a good compromise between the article III status and that of assuring that you're getting good people to apply for these jobs and that they're going to keep their eye totally on dispensing justice and not on succeeding themselves.

Mr. THROWER. May I supplement that, Mr. Chairman, with this brief comment. I have worked for years with officials in the Treasury Department of whatever administration happened to be in office at the time, undertaking to find qualified people for the Tax Court.

The potential appointees are successful people. They're generally happy. They're generally well situated. It is significant to them, of course, as to what is the compensation and as to what is the future at the end of that 15-year period. If they are considering an appointment while in their early forties or younger and look at what they will be facing at the end of the 15-year period—it will make a difference.

It does make a difference in securing qualified people for the Tax Court and I believe it will have an impact over the years with respect to the quality of the personnel on this court.

Senator HEFLIN. Do either one of you know any of the judges in the Tax Court that have retired on full salary because the President was unwilling to reappoint them?

Mr. KIPPS. I don't know of any, Mr. Chairman.

Mr. THROWER. I know of rare instances. It has been some years ago and I'm not sure what the retirement provisions were at that time.

Senator HEFLIN. This matter of life tenure on the salary sort of concept, some would argue that even better than life tenure on the article III judge--because the judges would only have to work limited days and would be free, with some limitations, to pursue their own interests. Do either one of you want to comment on that?

Mr. KIPPS. I think in practice, Mr. Chairman, the system has resulted in reappointments or frequently that the judges who have served on—as senior—taken senior status or served in this capacity have found themselves working virtually full time.

Senator HEFLIN. Both of you allude to the fact that although the President appoints judges to the Claims Court, the Department of Justice and practitioners before the court have a great deal of say in the process.

Is their role institutionalized or is it informal? Do the practitioners of the Claims Court participate in the process?

Mr. KIPPS. It's both, Mr. Chairman. We have Bar Associations that have judicial selection committees who participate in a formalized manner.

Then we have people that have been interested in that Court and the Court of Appeals for the Federal Circuit for many, many years, and they do informally talk with the various people in the appointing chain.

Mr. THROWER. The Claims Court Bar Association has a selection committee and we hope to be able to participate in a supportive

way in the screening and the identifying of qualified candidates for any vacancies.

Senator HEFLIN. Thank you. We may submit some questions in writing. A letter from the Administrative Office of the Courts will be entered into the record. It says:

> In response to your request for the Judicial Conference's views on S. 1608, I enclose for your consideration, position adopted by the Conference at its meeting on September 21, 1987.
>
> I expect there will be further action on this issue at the Conference's meeting of March 15, 1988. A committee report is scheduled for the discussion calendar at that time. Because the bill will be the subject of discussion, I must emphasize that the recommendation contained in the committee report should not be considered the final Conference position. We will immediately notify you and the Committee of any further action taken by the Judicial Conference.

And the September recommendation was:

> The United States Claims Court was created in 1982 as an Article I court in the judicial branch. Noting certain constitutional, administrative, and functional problems with the existing configuration, the Chief Judge of the Claims Court proposed the reestablishment of the United States Claims Court as an Article I court outside of the judicial branch.
>
> Without consideration of any constitutional questions which might be involved, the Conference determined not to object to the creation of an Article I Claims Court outside of the judicial branch.

——— Well, this concludes the hearing and we appreciate everybody coming by.

[The committee was adjourned at 11:34 a.m.]

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